A

# Azman bin Jufri v Medtronic Australasia Pty Ltd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(lM)-85–07 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND VERNON ONG JJCA
29 APRIL 2015

C *Bankruptcy — Setting aside — Application for — Creditor's petition and bankruptcy notice — Amendment — High Court allowed amendment — Whether amendment should be allowed — Whether service of bankruptcy cause papers defective — Application to obtain order for substituted service — Whether correct mode of application — Filing of notice of application as*
D *opposed to summons in chambers — Whether orders for substituted service rendered null and void*

The judgment creditor ('JC') had obtained summary judgment against the
E judgment debtor ('JD') and a bankruptcy notice ('BN') was issued against the JD for the payment of the judgment debt. Both the BN and CP were served on the JD by way of substituted service. The JC filed an application for leave to amend the CP by substituting 30 May 2013 for 28 May 2013 as the date of the act of bankruptcy. Leave to amend the CP was given by the senior assistant
F registrar ('SAR') which was affirmed by the High Court judge. The JD appealed against the said decision of the High Court judge ('Appeal 86') and proceeded to file an application to set aside the bankruptcy cause papers. The SAR dismissed the JD's application and this was affirmed by the High Court judge. The JD appealed against the decision of the High Court judge ('Appeal
G 85'). Both appeals were heard together.

**Held**, allowing the Appeal 85 with costs; dismissing the Appeal 86 with costs:

(1) The misstatement as to the date of the act of bankruptcy in the CP did
H not prejudice the JD because the CP was filed seven days after the date of the act of bankruptcy was committed. There was no evidence to show that as at the date of the act of bankruptcy, the JD had made any attempt to satisfy the judgment debt or that the JD had any counterclaim, set off or cross demand. There was no substantial injustice caused by the error in
I the date of the act of bankruptcy (see para 12).

(2) There is no express stipulation to say that the requirement to annex the petition to the verifying affidavit is mandatory. Form 11 prescribed by r 106 of the Bankruptcy Rules 1969 ('the Rules') merely adverts to 'the petition hereunto annexed'. Accordingly, the failure to annex the petition

to the verifying affidavit was only a formal defect or irregularity, which was curable within the meaning of s 131 of the Act and r 274 of the Rules (see para 27).

(3) Rules 18(1) of the Rules makes it mandatory for an application to be filed by summons in chambers. The filing of a notice of application by the JC as opposed to a summons in chambers was a clear breach of the mandatory provision. The breach was not a mere irregularity or formal defect capable of being cured. The application was in a sense the originating process upon which the JC sought to obtain an order for substituted service. The wrong mode adopted by the JC undermined the very stratum of the application for substituted service itself and consequently, any order obtained thereunder must be equally tainted and rendered null and void. Thus, the applications for substituted service of the BN and CP were invalid and ought to have been dismissed; and consequently the orders for substituted service of the BN and CP were null and void and set aside (see paras 38–39).

**[Bahasa Malaysia summary**

Pemiutang penghakiman ('JC') berjaya mendapat penghakiman ringkas terhadap penghutang penghakiman ('JD') dan satu notis kebankrapan ('BN') dikeluarkan terhadap JD menuntut bayaran hutang penghakiman. Kedua-dua BN dan CP diserahkan kepada JD dengan cara penyampaian ganti. JC memfailkan permohonan kebenaran meminda CP dengan menggantikan 30 Mei 2013 dengan 28 Mei 2013 sebagai tarikh tindakan kebankrapan. Kebenaran meminda CP diberikan oleh penolong kanan pendaftar ('SAR') yang mana disahkan oleh hakim Mahkamah Tinggi. JD merayu terhadap keputusan Hakim Mahkamah Tinggi tersebut ('Rayuan 86') dan seterusnya memfailkan permohonan untuk mengetepikan kertas kausa kebankrapan. SAR menolak permohonan JD dan ini disahkan oleh Hakim Mahkamah Tinggi. JD merayu terhadap keputusan Hakim Mahkamah Tinggi ('Rayuan 85'). Kedua-dua rayuan didengar bersekali.

**Diputuskan**, membenarkan Rayuan 85 dengan kos; menolak Rayuan 86 dengan kos:

(1) Kenyataan salah berkenaan tarikh tindakan kebankrapan dalam CP tidak menjejaskan JD kerana CP difailkan tujuh hari selepas tarikh tindakan kebankrapan dilakukan. Tidak ada bukti yang menunjukkan bahawa pada tarikh tindakan kebankrapan, JD ada membuat apa-apa percubaan untuk memenuhi hutang penghakiman atau bahawa JD ada membuat tuntutan balas, tolakan atau tuntutan silang. Tiada ketidakadilan berat yang berlaku akibat kesilapan dalam tarikh tindakan kebankrapan (lihat perenggan 12).

(2) Tiada penetapan nyata untuk menyatakan bahawa keperluan untuk melampirkan petisyen pada afidavit pengesahan adalah wajib. Borang 11 yang ditetapkan oleh k 106 Kaedah-Kaedah Kebankrapan 1969 ('Peraturan') sekadar menyarankan 'petisyen yang dilampirkan'. Oleh itu, kegagalan untuk melampirkan petisyen pada afidavit pengesahan hanya kecacatan atau luar aturan yang formal, yang boleh diremedi di bawah s 131 Akta dan k 274 Kaedah-Kaedah (lihat perenggan 27).

(3) Peraturan 18(1) peraturan-peraturan mewajibkan permohonan difailkan melalui saman dalam kamar. Pemfailan notis permohonan oleh JC berbanding dengan saman dalam kamar jelas melanggar peruntukan mandatori. Pelanggaran bukan sekadar satu ketidakpatuhan atau kecacatan formal yang boleh diperbaiki. Permohonan tersebut, dalam satu segi, adalah proses pemulaan yang mana JC cuba mendapatkan perintah penyampaian ganti. Kaedah salah yang diterima pakai oleh JC melemahkan lapisan paling atas permohonan bagi penyampaian ganti sendiri dan akibatnya, apa-apa perintah yang diperoleh di bawahnya turut sama tercemar dan tidak sah dan terbatal. Oleh itu, permohonan penyampaian ganti BN dan CP tidak sah dan sepatutnya ditolak; dan seterusnya perintah bagi penyampaian ganti BN dan CP terbatal dan tidak sah dan diketepikan (lihat perenggan 38–39).]

**Notes**

For cases on setting aside in general, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3926–3929.

**Cases referred to**

*Abrahamson; Re* (1978) 22 ALR 749 (refd)
*Alwee v Lai Kong Fook & Ors* [1981] 2 MLJ 82, FC (refd)
*Aris bin Massod; ex parte UOL Factoring Sdn Bhd; Re* [1999] 3 MLJ 358, HC (refd)
*Cho Yu-Lon v Arab-Malaysian Finance Bhd* [2003] 5 MLJ 289; [2003] 2 CLJ 186, HC (refd)
*Dato' Dr Elamaran a/l M Sabapathy; ex parte RHB Bank Bhd; Re* [2010] MLJU 1424; [2011] 10 CLJ 262, HC (refd)
*Daunt; Re* [1905] 5 SR (NSW) 553 (refd)
*Debtor, In re a (No 7 of 1910)* [1910] 2 KB 59, CA (refd)
*Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724, FC (refd)

*Everise Hectares Sdn Bhd v Citibank Berhad* [2010] MLJU 1379; [2011] 2 CLJ 25, CA (refd)
*Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 1 CLJ (Rep) 606, HC (refd)
*Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)* [2014] 1 MLJ 439; [2013] 6 CLJ 579, CA (refd)
*Matthias Chang Wen Chieh v American Express (Malaysia) Sdn Bhd* [2012] MLJU 214, CA (refd)
*Mohd Zuhri Mohd Idris; Ex Parte Bumiputra-Commerce Bank Berhad; Re* [2009] MLJU 491; [2010] 1 CLJ 786, HC (refd)
*Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526, HC (refd)
*Puan Sri Mona Kishu Thiratrai @ Mona Kishenchand; ex p Affin Bank Bhd; Re* [2007] 3 MLJ 223; [2007] 7 CLJ 657, HC (refd)
*Raman Chettiar v Ledchumanan Chettiar* [1939] 1 MLJ 259 (refd)
*Rohani @ Hamidah bt Nor v Sincere Leasing Sdn Bhd* [1993] 1 AMR 225, HC (refd)
*Smijaya Sdn Bhd dan lain-lain lwn Perwira Affin Bank Bhd* [2010] 3 MLJ 54, CA (refd)
*Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd* [2002] 2 MLJ 367, HC (refd)
*Susila a/p S Sankaran v Subramaniam a/l P Govindasamy* [2012] 9 MLJ 779, HC (refd)
*Teo Ah Bin @ Teo Eng Bin v Tan Kheng Guan* [2002] 3 MLJ 121, HC (refd)
*Teoh Thean Peng, ex parte D & C Leasing Sdn Bhd; Re* [1993] 2 MLJ 1; [1993] 2 CLJ 665, HC (folld)
*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, FC (refd)

**Legislation referred to**

Bankruptcy Act 1967 ss 6(1), 131
Bankruptcy Act [AU] s 52(1)(a)
Bankruptcy Rules 1969 rr 18, 18(1), 106, 110, 117, 122, 169, 274, Forms 11, 12, 16
Bankruptcy Act 1952 [UK]
Bankruptcy Rules 1952 [UK]
Insolvency Act 1986 [UK]
Insolvency Rules 1986 [UK]
Rules of Court 2012 O 65 r 5

**Appeal from:** Bankruptcy No 29–2017–04 of 2013 (High Court, Kuala Lumpur)

*Lee Chooi Peng (Kho Zhen Qi and Chu Soon Wei with her) (Justin Voon Chooi & Wing) for the appellant.*
*Mohd Arief Emran B Arifin (Nimisha Jaya Gobi with him) (Wong & Partners) for the respondent.*

**Vernon Ong JCA:**

INTRODUCTION

**[1]** Appeal No 85 relates to the judgment debtor's application to set aside the bankruptcy cause papers and service of the same on him. The judgment debtor is appealing against the decision of the learned High Court judge affirming the decision of the senior assistant registrar dismissing the judgment debtor's application.

**[2]** Appeal No 86 relates to the judgment creditor's application to amend its creditor's petition. The judgment debtor is appealing against the decision of the learned High Court judge affirming the decision of the senior assistant registrar in allowing the amendment of the creditor's petition.

**[3]** As both appeals arose from the same bankruptcy proceedings they were heard together. For convenience, the appellant shall be referred to as the JD and the respondent as the JC.

ANTECEDENTS PROCEEDINGS

**[4]** The JC obtained summary judgment on 14 March 2012 against the JD for RM8,687,247.45 together with interest and costs. The summary judgment is a final judgment as the JD's appeal against the summary judgment has been dismissed by the Court of Appeal and the Federal Court.

**[5]** On 15 April 2013, a bankruptcy notice ('BN') was issued against the JD demanding payment of the judgment debt. Service of the BN was effected by way of substituted service pursuant to an order for substituted service dated 26 April 2013.

**[6]** The creditor's petition ('CP') was filed on 7 June 2013 and also served on the JD by way of substituted service pursuant to an order for substituted service dated 21 June 2013.

**[7]** On 21 January 2014, the JC filed an application for leave to amend the CP by substituting '30/05/2013' for '28/05/2013' as the date of the act of bankruptcy as stated in para 5 of the CP. Leave to amend the CP was given by

the senior assistant registrar ('SAR') on 26 March 2014. On 3 April 2014, the JD filed a notice of appeal to judge in chambers against the order of the SAR.

**[8]** On 18 October 2013, the JD filed an application to set aside the bankruptcy cause papers and service of the same. On 24 March 2014, the SAR dismissed the JD's application. On 3 April 2014, the JD filed a notice of appeal to judge in chambers against the order of the SAR.

**[9]** Both appeals were heard together by the learned High Court judge on 30 May 2014. On 26 June 2014, the learned High Court judge delivered her decision dismissing both appeals.

DECISION OF THE COURT

*Appeal No 86*

**[10]** We propose to begin with the appeal relating to the amendment of the CP. It is the JD's contention that the application for amendment was not bona fide because the wrong date of the alleged act of bankruptcy stated in the CP was one of the issues raised by the JD to set aside/strike out the CP (*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; *Alwee v Lai Kong Fook & Ors* [1981] 2 MLJ 82; *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 1 CLJ (Rep) 606; *Smijaya Sdn Bhd dan lain-lain lwn Perwira Affin Bank Bhd* [2010] 3 MLJ 54; *Everise Hectares Sdn Bhd v Citibank Berhad* [2010] MLJU 1379; [2011] 2 CLJ 25).

**[11]** It was also contended for the JD that the JC was estopped from amending the date of the act of bankruptcy in the CP. The JD first raised the 'wrong date of the act of bankruptcy' in his affidavit to support his application to strike out the CP and the JC had denied in their affidavit in reply that the date of the act of bankruptcy stated in the CP was wrong (*Teo Ah Bin @ Teo Eng Bin v Tan Kheng Guan* [2002] 3 MLJ 121).

**[12]** We do not think that the misstatement of '28.5.2013' instead of '30.5.2013' as the date of the act of bankruptcy in the CP prejudiced the JD because the CP was filed on 7 June 2013, a period of seven days after the date of the act of bankruptcy was committed. Further, there is no evidence to show that as at the date of the act of bankruptcy (30 May 2013) the JD had made any attempt to satisfy the judgment debt or that the JD has any counterclaim, set off or cross demand. Accordingly, we agree with the learned High Court judge's finding that there was no substantial injustice caused by the error in the date of the act of bankruptcy. This is a proper case where s 131 of the Bankruptcy Act 1967 ('BA 1967') could be invoked to regularise the CP.

**[13]** We, would, therefore dismiss Appeal No 86 with costs.

*Appeal No 85*

**[14]** Five principal grounds of appeal were canvassed at the hearing of the appeal. They are as follows:

(a) the request to issue BN is invalid;

(b) service of the BN and CP is bad as service were not effected on the correct address of the JD;

(c) the BN and CP ought to be set aside as there was another BN dated 12 April 2013 when the BN and CP was filed by the JC;

(d) the CP is defective as the affidavit of truth of statements in petition did not annex a copy of the CP; and

(e) the orders for substituted service of the BN and CP are defective.

Whether the request to issue BN is invalid?

**[15]** The first ground relates to the fact that the name and NRIC number of the JD was not inserted in the request to issue BN. We note that even though it was not inserted in the first paragraph of the request for issue of BN, the JD's name and NRIC number is inserted in the intitulement of the request. As such, there is no confusion or doubt as to the identity of the JD in the request. We would agree with the learned High Court judge's finding that the irregularity did not invalidate the proceedings as no substantial injustice has been occasioned (s 131 of the BA 1967).

Whether service of BN and CP is bad?

**[16]** The second ground relates to service of the BN and CP on the JD's address. The JD's contention is that the cause papers were wrongly served at 'B-022–04, Kiaramas Sutera 7, Jalan Desa Kiara, 50480 Kuala Lumpur' whereas his correct address is at 'B-22–04, Kiaramas Sutera Condominium, 7, Jalan Desa Kiara, 50480 Kuala Lumpur'. The learned High Court judge found as a fact that the two addresses referred to the same place as the unit number, road name and post code are the same. Both addresses refer to Jalan Desa Kiara. Further, the address relied on by the JC is the address obtained from the National Registration Department of Malaysia. In contrast, the JD's contention is premised on an advertisement from Propwall the probative value of which is questionable. More significantly, the JD's stand is contradicted by the fact that he has admitted to receiving a letter dated 6 September 2013 issued by the JC to the very same address which he contends is the wrong

address. For the foregoing reasons, we are in agreement with the findings of the learned High Court judge on this issue.

Whether there is any duplicity of bankruptcy proceedings?

**[17]** The third ground relates to the duplicity of bankruptcy proceedings. We have perused the appeal record and agree with the learned High Court judge that the previous bankruptcy notice filed on 12 April 2013 had already been withdrawn and was no longer an issue before the senior assistant registrar. As such, we do not see any merit in the JD's argument.

Whether the proceedings are nullified by the failure to annex the petition to the verifying affidavit?

**[18]** The fourth ground is more substantive. It deals with the question of whether the fact that a copy of the CP is not annexed to the affidavit of truth of statements in petition is fatal so as to nullify the proceedings.

**[19]** Section 6(1) of the BA 1967 provides that a creditor's petition shall be verified by the affidavit of the creditor or of some person on his behalf having knowledge of the facts and shall be served. The manner in which the affidavit is required to be filed is set out in r 106 of the Bankruptcy Rules 1969:

> 106 Verification
>
> (1) A creditor's petition shall be verified by affidavit.
>
> (2) A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them.

**[20]** The prescribed form for the verifying affidavit is Form 11 which requires that the petition be annexed to it. This is evident from the opening paragraph of Form 11 as follows:

> I, the petitioner named in the *petition hereunto annexed*, affirm (if the petitioner declare or affirm, alter the form accordingly) and say: 1. ... (Emphasis added.)

**[21]** In *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526, one of the objections taken by the judgment debtor was that the petition had not been verified by affidavit required by s 6(1) of the BA 1967 and Form 11 prescribed by r 106 of the BR 1969 in that although the verifying affidavit was filed together with the petition, the petition was not annexed to the affidavit. Edgar Joseph Jr J (as he then was) held that the verifying affidavit prescribed by r 106 is Form 11 which requires the petition to be annexed to it; the petition must be tied to or bound to or attached to or joined to or affixed to or stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified. The failure to do so goes beyond being a mere irregularity and

amounts to something that renders the proceedings a nullity thereby sweeping away the jurisdiction of the court. The fact that no substantial injustice or no prejudice had been suffered by the debtor is beside the point and s 131 of the BA 1967 is without application.

**[22]** *Ooi Thean Chuan* was followed in *Cho Yu-Lon v Arab-Malaysian Finance Bhd* [2003] 5 MLJ 289; [2003] 2 CLJ 186 where Kamalanathan Ratnam J held that a copy of the creditor's petition introduced as an exhibit to the affidavit and stapled to the affidavit would suffice to meet the requirements of r 106 and Form 11.

**[23]** *Ooi Thean Chuan* was also followed in *Re Dato' Dr Elamaran a/l M Sabapathy; ex parte RHB Bank Bhd* [2010] MLJU 1424; [2011] 10 CLJ 262 where the judgment debtor applied to set aside the bankruptcy notice and creditor's petition. It was contended, inter alia, that the affidavit verifying petition accompanying the creditor's petition had not had the petition annexed to it. Varghese George JC (later JCA) held that the verifying affidavit did not comply with the requirements of the BA 1967 and the BR 1969. The omission to annex the creditor's petition to the verifying affidavit was a matter which went to the materiality of contents and hence a substantive matter.

**[24]** In *Re Puan Sri Mona Kishu Thiratrai @ Mona Kishenchand; ex p Affin Bank Bhd* [2007] 3 MLJ 223; [2007] 7 CLJ 657, Kang Hwee Gee J (later JCA) departed from the view taken by Edgar Joseph Jr J in *Ooi Thean Chuan*. His Lordship held that the purpose of Form 11 was merely to bring to the notice of the judgment debtor that the verifying affidavit had been annexed to the petition. If indeed the verifying affidavit and the petition had been brought to the notice of the judgment debtor that purpose would have been achieved. It is the substance not the form that matters. A minor infraction (even if proven) does not make the petition ineffective and bad.

**[25]** A similar issue arose in *Re Teoh Thean Peng, ex parte D & C Leasing Sdn Bhd* [1993] 2 MLJ 1; [1993] 2 CLJ 665 where *Ooi Thean Chuan* was referred to but not followed. KC Vohrah J (later JCA) held that the proceedings are not rendered a nullity even if the petition is not annexed to the verifying affidavit which has the same title and distinctive number as the petition does verify the statements in the petition with sufficient particularity. The verifying affidavit serves a limited purpose of enabling the registrar to investigate the petition in order to decide whether to seal copies of the petition and once the copies are sealed for service it is clear that the registrar adverted to the verifying affidavit for investigation under r 108 of the BR 1969 and that the affidavit must have borne the title and distinctive number borne by the petition itself unless the contrary can be shown.

**[26]** With respect, we think that *Teoh Thean Peng* is the better view. We agree with His Lordship's observation that in *Ooi Thean Chuan* Edgar Joseph Jr J's considered *Re Daunt* [1905] 5 SR (NSW) 553 and *Re Abrahamson* (1978) 22 ALR 749 both of which are Australian cases. In particular, the decision in *Ooi Thean Chuan* relied principally on a passage in the Tasmanian case of *Re Abramson* where Neasey J explained why it was necessary to annex a copy of the petition to the affidavit under s 52(1)(a) of the Australian Bankruptcy Act and stated that 'it provides that at the hearing of a creditor's petition the court shall require proof of the matters stated on the petition but for that purpose may accept the affidavit verifying the petition as sufficient'. His Lordship said at p 668 that 'That was, however, not the position in England in relation to English Bankruptcy Act 1952 (now replaced by the Insolvency Act 1986) and the Bankruptcy Rules 1952 (BR) (now replaced by the Insolvency Rules 1986) (our Act and Rules were substantially modelled on the 1952 Act and Rules) … '. His Lordship also adverted to a passage from *Williams and Muir on Bankruptcy* (19th Ed) at p 56, which stated that the affidavit verifying petition cannot be used upon the hearing of the bankruptcy petition; reference being made to r 169 and Form 12 which corresponds substantially to r 122 and Form 11 of the BR 1969. Therefore, the affidavit verifying petition cannot be used at the hearing of the bankruptcy petition (see also *Debtor, In re a (No 7 of 1910)* [1910] 2 KB 59 at p 62).

**[27]** Section 6(1) of the BA 1969 and r 106 of the BR 1969 which lays out the procedure for compliance are similarly worded. It is pertinent to note that there is no express stipulation to say that the requirement to annex the petition to the verifying affidavit is mandatory. Form 11 merely adverts to 'the petition hereunto annexed'. Accordingly, we hold that the failure to annex the petition to the verifying affidavit is only a formal defect or irregularity. Therefore, the defect is one which is curable within the meaning of s 131 of the BA 1967 and r 274 of the BR 1969 which are as follows:

> Section 131 Formal defect not to invalidate proceedings. No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court be which an objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.
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> Rule 274 Effect of non-compliance with Rules.
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> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

**[28]** Accordingly, we hold that the bankruptcy proceedings are not rendered a nullity by the omission to annex the petition to the verifying affidavit.

Whether orders for substituted service valid?

**[29]** The last point relates to the validity of the orders for substituted service of the BN and CP. The JD's attack is premised on (a) the argument that the wrong mode of application was used by the JC for the application; and (b) the letters of appointment dated 17 April 2013 and 13 June 2013 did not comply with practice note no 1 of 1968.

**[30]** It is contended that the applications were made by way of notice of application instead of summons in chambers in contravention of the mandatory provision of r 18 of the Bankruptcy Rules 1969 ('BR 1969'). As bankruptcy proceedings are quasi-penal in nature, it is imperative that procedural requirements are complied with strictly. In support of this contention, learned counsel referred the following authorities: *Matthias Chang Wen Chieh v American Express (Malaysia) Sdn Bhd* [2012] MLJU 214 (CA)); *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724 (FC)); *Susila a/p S Sankaran v Subramaniam a/l P Govindasamy* [2012] 9 MLJ 779; *Re; Aris bin Massod; ex parte UOL Factoring Sdn Bhd* [1999] 3 MLJ 358; *Rohani @ Hamidah bt Nor v Sincere Leasing Sdn Bhd* [1993] 1 AMR 225; *Raman Chettiar v Ledchumanan Chettiar* [1939] 1 MLJ 259; *Re; Mohd Zuhri Mohd Idris; Ex Parte Bumiputra-Commerce Bank Berhad* [2009] MLJU 491; [2010] 1 CLJ 786; *Lim Boon Kiak v Affin Bank Bhd (formerly known as BSN Commercial Bank (M) Bhd)* [2014] 1 MLJ 439; [2013] 6 CLJ 579; *Soda KL Plaza Sdn Bhd v Noble Circle (M) Sdn Bhd* [2002] 2 MLJ 367).

**[31]** On this point, the learned High Court judge referred to O 65 r 5 of the Rules of Court 2012 which provides that an application for an order for substituted service shall be made by notice of application. She found that as r 110 of the BR 1969 on substituted service did not prescribe the mode of application, the applications made by way of notice of application are correct and regular.

**[32]** Rule 110 of the BR 1969 gives the Bankruptcy Court power to order substituted service if it is satisfied by affidavit or other evidence on oath that prompt personal service cannot be affected because the debtor is keeping out of the way to avoid service of the petition or any other process. Whilst r 110 does

not prescribe the mode of application for an order of substituted service, the mode of application is expressly stipulated under r 18(1) of the BR 1969 in the following terms:

> 18 *Applications to be made by summons in chambers.*
>
> Except where these Rules or the Act otherwise provide, *every application to the Court shall*, unless the Chief Justice otherwise directs, *be made by summons in chambers* supported by affidavit. (Emphasis added.)

**[33]** In *Mathias Chang*, the appellant applied by notice of motion to set aside the bankruptcy notice issued against him. The Court of Appeal upheld the respondent's preliminary objection that the application should be made by way of a summons in chambers and not by way of a notice of motion. At para [22], Abdul Malik Ishak JCA speaking for the Court of Appeal said:

> Rule 18 of the Bankruptcy Rules 1969 stipulates that every application to the Court shall be made by summons in chambers supported by affidavit. The word 'shall' is used and it denotes a mandatory act. Since the appellant filed enclosure 6 by way of a notice of motion, it runs counter to and in defiance of Rule 18 of the Bankruptcy Rules 1969. The learned High Court Judge was right in dismissing enclosure 6 (*Development & Commercial Bank v Datuk Ong Kian Seng* [1995] 2 MLJ 724 (FC)).

**[34]** In *Ong Kian Seng*, the appellant bank issued a bankruptcy notice against the respondent debtor on an unsatisfied judgment debt pursuant to a final consent judgment. The bankruptcy notice was followed by the filing of a creditor's petition. The respondent debtor filed an affidavit opposing the creditor's petition contending that the bankruptcy notice was invalid as the interest specified was wrongly calculated. At the hearing of the petition, the appellant bank raised a preliminary objection that the respondent debtor's affidavit was not a proper notice to oppose the petition under r 117 of the BR 1969 as he was required to file a notice in Form 16 specifying the statements in the petition which he disputed. The judge overruled the objection and held that the affidavit was sufficient to give notice to the appellant bank of the respondent debtor's intention to oppose the petition and that the failure to file a notice under r 117 was only a formal defect which did not cause substantial injustice to the appellant bank, relying on s 131 of the BA 1967 and r 274 of the BR 1969. The appellant appealed to the Federal Court on the grounds that the judge erred in law in treating the respondent debtor's affidavit as a notice to oppose the petition under r 177 of the BR 1969. The Federal Court held that r 117 clearly provides that a debtor shall file a notice specifying the statements in the petition which he intends to deny or dispute. The failure to file a notice under r 117 supported by an affidavit cannot be excused as a mere formal defect. At p 732, Mohamed Dzaiddin FCJ (as he then was) speaking for the Federal Court said:

> ... We hasten to add that no breach of a mandatory rule can be described as a formal

defect or an irregularity that can be cured (*Au-Yong v Dicum & Anor* [1963] MLJ 349 (CA) at p 354).

We are also of the view that s 131 of the Act and r 274 of the Rules do not apply. Section 131, which is in the same terms as s 147(1) of the English Bankruptcy Act 1941, states:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Lord Diplock, delivering the judgment of the Privy Council in *Rengasamy Pillar v Comptroller of Income Tax* [1970] 1 MLJ 233 (PC), drew a distinction between a defect which renders the bankruptcy proceedings a nullity and a mere form defect or irregularity in the following words (at p 236):

> But there is relevant authority upon the construction of the identical words in s 147(1) of the English Bankruptcy Act 1941. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
>
> What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor ex p The Debtor v Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon which it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. *Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.* (Emphasis added.)

**[35]** It is also contended that the order for substituted service is invalid and ought to be set aside for failure to comply with practice note no 1 of 1968 which is as follows:

> Application for Substituted Service in The High Court in Malaya.
>
> The practice governing applications for substituted service in the High Court in Malaya shall follow that in the High Court in England, as provided for in Order 10 rule 2 of the Rules of the Supreme Court 1975. The practice, taken from the 1957 White Book, page 88 is here reproduced.
>
> 1 Two calls should be made.

2 The calls should be made at the defendants' residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his nosiness address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to served is left, it must be in a sealed envelop addressed to the defendant.

3 The calls should be made on weekdays and at reasonable hours.

4 Each call should be on a separate day.

5 The second call should be made by appointment by letter sent to the defendant by ordinary prepared letter post, giving not less than two clear days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.

6 On keeping the appointment, the process server should inquire whether the defendant has received the letter of appointment with the copy document, and if it is stated that the defendant, is away, inquiry should be made whether or not letters are being, or have been forwarded to an address within the jurisdiction; the object is to show that the defendant has received communications sent to him.

7 The affidavit is support of the application should deal with all the foregoing requirements and should further state whether the letter of appointment has been returned or not, and any answer received should be exhibited. A copy of the document to served should accompany the affidavit.

No prescribed from is necessary for the letter of appointment.

The letter of appointment should ordinarily be sent by the solicitor for the plaintiff after ascertaining from the process servers in the High Court and other courts their available times and dates from the second call. The facts regarding the letter of appointment should be stated in the affidavit in support.

Compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such a statement should never be sufficient to apply for an order for substituted service. If the above practice is followed as required by the Rules of the Supreme Court 1957, the efforts which have been made to find the defendant and the reasons for believing that he is keeping out of the way to avoid service will be before the Senior Assistant Registrar/ Assistant Registrar before the order is made.

(Au Ah Wan)

Registrar

The High Court Registrar,

The Law Courts, Kuala Lumpur

10th June 1968

**[36]** In this instance, a perusal of the two letters of appointment in question show that the documents to be served were not enclosed; what was enclosed

was a 'surat jawapan' for the debtor to fill in the time and date for service to be effected. There is nothing in the affidavits of non-service affirmed by Mohd Rezal bin Idris on 25 April 2013 and 21 June 2013 respectively to show that the documents to be served were enclosed with the letters of appointment. Paragraph no 5 of the practice note stipulates that the second call shall be made by appointment by letter sent to the debtor enclosing a copy of the documents to be served.

**[37]** We note that the requirement to enclose the documents are guidelines provided in the practice note. In of itself, the omission to enclose the documents in the letters of appointment may be regarded as a formal defect or irregularity capable of being cured. We do not see that substantial injustice has been occasioned by this omission on the part of the JC.

**[38]** We now return to the arguments on the correct mode of application. Applying the authorities cited above, it is settled law that the word 'shall' is mandatory and thereby imposes an obligation to comply with what is required to be done. We do not consider that since r 110 of the BR 1969 is silent on the mode of application, the applications made by notices of application are correct and regular. There is a clear stipulation in r 18(1) of the BR 1969 making it mandatory for an application to be filed by summons in chambers. In the circumstances, the filing of a notice of application by the JC as opposed to a summons in chambers is a clear breach of a mandatory provision. The breach is not a mere irregularity or formal defect capable of being cured. The application is in a sense the originating process upon which the JC seeks to obtain an order for substituted service. As such the wrong mode adopted by the JC undermines the very stratum of the application for substituted service itself and consequently, any order obtained thereunder must be equally tainted and rendered null and void.

**[39]** On the aforesaid grounds we are constrained to hold that the applications for substituted service of the BN and the CP are invalid and ought to have been dismissed; and consequently, the orders for substituted service of the BN and CP are null and void and set aside. Accordingly, the service of the BN and CP are set aside.

**[40]** In the result, Appeal No 85 is allowed with costs.

**[41]** We order that costs in respect of both appeals to be fixed at RM10,000. The deposits are ordered to be refunded.

*Appeal 85 allowed with costs; Appeal 86 dismissed with costs.*

Reported by Afiq Mohamad Noor